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THE AMATEUR SPORTS DRAFT: THE BEST MEANS TO THE END?

JEFFREY A. ROSENTHAL*

I. INTRODUCTION

One area of sports with potential antitrust concerns has been the amateur sports draft. All four major sports — baseball, football, basketball, and hockey — use similar draft mechanisms. Depending on the caliber of players eligible in a given year, the draft (and even the pre-draft lottery in basketball and, now, hockey) can provide much drama and publicity. Every so often, either a player, an agent or a member of the media questions the legality of the draft. Rumored changes in the draft or alternative proposals are regularly reported.

The dilemma over whether to endorse or condemn the amateur draft is that the draft has both positive and negative aspects. One's opinion of the legality of the draft often depends on how one balances these pros and cons. The major positive aspect of the draft, and the primary justification for it, is that the draft provides a way to distribute talent to teams and its goal is to do so both fairly and in such a way so as to maintain a competitive balance. On the other hand, the draft distorts the free market and eliminates the choice of amateurs to decide where they want to play and with whom to negotiate.[1]

In recent years, the amateur drafts of all four major sports have come under greater scrutiny, either for changes implemented in the draft or for actions taken by specific individuals. Major League Baseball (MLB) relatively recently changed its draft to eliminate the primary leverage which high school players held — the old rule permitted teams to hold exclusive rights to drafted players for only one year (thus allowing players the alternative of going to college to use as leverage in contract nego-

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1. A standard analogy, repeated so regularly by some lawyers and agents, is a system in which an attorney graduates from law school and is drafted by, and forced to work for, a law firm in Biloxi, Mississippi, rather than a firm in San Francisco for whom the lawyer wants to work. *See, e.g., Leigh Steinberg, Negotiating Contracts in the National Football League*, C627 A.L.I.-A.B.A. 617, 619-20 (1991).

tiations); the new rule created a substantially longer period of time (until after college graduation) during which the teams would hold exclusive negotiating rights. This change effectively removed the threat that had resulted in huge signing bonuses for college-eligible players such as Brien Taylor and Todd Van Poppel. In response to the implementation of this change, however, the Major League Baseball Players Association (MLBPA) successfully challenged the new rule, and won an arbitration decision, forcing the change to be discarded.

The National Basketball Association (NBA) has changed its draft in recent years. The basketball draft, resulting from the collective bargaining agreement which was initially upheld in *Robertson v. National Basketball Association*,[2] was modified to restrict it to merely two rounds (for a total of only fifty-four — now fifty-eight after expansion to Toronto and Vancouver — players).[3] All other players are free agents and may negotiate with any team. The players wanted a shorter draft so each marginal player could negotiate as a free agent, thus having a greater chance of making a team since he can try out for any team that may need him rather than only the team that drafts him. Furthermore, if any of these undrafted free agents makes a team, he might have greater leverage to sign a more lucrative contract. Another major recent change concerning the NBA draft is that college underclassmen who enter the draft now have the option of returning to college to play basketball, so long as they elect to do so within thirty days of the draft.[4] In such a circumstance, the drafting team retains exclusive negotiating rights for one additional year.[5]

The National Football League (NFL), which has had the notoriety of losing the only case directly challenging the legality of a professional sports draft, *Smith v. Pro-Football, Inc.*,[6] has undergone significant change. Following the 1989 draft, the NFL changed its longstanding policy that underclassmen are only eligible to be drafted upon demonstration of "hardship" and implemented a new policy whereby all players who were at least three years out of high school were eligible to be

2. 72 F.R.D. 64 (S.D.N.Y. 1976), *aff'd*, 556 F.2d 682 (2d Cir. 1977).

3. Collective Bargaining Agreement between the NBA and the National Basketball Players Association (NBPA), Art. IV, § 1(a) (Nov. 1, 1988)[hereinafter NBA AGREEMENT]. Under the new collective bargaining agreement reached in September 1995, the NBA's amateur draft will be shortened to one round beginning in 1998. See Murray Chass, *Stern Works Magic and Keeps His Perfect Mark*, N.Y. TIMES, Sept. 13, 1995, at B22.

4. Tim Layden, *Leap of Faith*, SPORTS ILLUSTRATED, Aug. 28, 1995, at 104, 109.

5. *Id.*

6. 420 F. Supp. 738 (D.D.C. 1976), *aff'd in part*, 593 F.2d 1173 (D.C. Cir. 1978).

drafted.[7] Unlike with basketball, however, college underclassmen who enter the NFL draft are ineligible to return to play college football.[8]

Furthermore, following a string of litigation losses and a disastrous players' strike in 1987, the National Football League Players Association (NFLPA) decertified on November 6, 1989.[9] After another round of lawsuits, the NFLPA recertified on March 30, 1993[10] and a new collective bargaining agreement was reached on May 6, 1993 (NFL Agreement). Under the NFL Agreement, the amateur draft was shortened to seven rounds and a rookie salary cap was implemented.[11]

Finally, the National Hockey League (NHL) draft, previously ignored by nearly all but the most die-hard of Canadian hockey fans, was thrust into the spotlight thanks to Eric Lindros, the top draft choice in 1991. Lindros, predicted at the time by many to be one of the most dominating players ever, was originally the subject of an unusual change in the normal expansion rules. The San Jose Sharks, a new addition to the NHL in 1991, would have traditionally received the first draft choice. However, some of the weaker teams in the league, having realized earlier that Lindros would be eligible for the draft in that expansion year and having recognized his extraordinary ability, threatened to block expansion unless the draft was changed whereby the worst team in the league would receive the first pick, San Jose would get the second, and then the draft would continue normally. This was precisely the change the NHL made.[12] The Quebec Nordiques received the first pick and drafted Lindros. Lindros subsequently refused to sign with the team (at any price), and created a provincial-wide furor (resulting not only from anger at his rejection of the Nordiques, but also from negative comments Lindros made about the French-speaking Quebec). Lindros' obstinance eventually forced the Nordiques to trade him to the Philadelphia Flyers.[13] The amateur draft was also a significant issue (although it paled in

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7. Layden, *supra* note 4, at 106.

8. *Id.* at 108.

9. Michael S. Kagnoff, *While Free Agents Reap Benefits of NFL Labor Settlement Agreement, Rookies Get Set for Further Legal Battles*, 1 SPORTS LAW. J. 109, 119 (1994).

10. *Id.* at 121.

11. *See* NFL AGREEMENT, Art. XVI, § 2.

12. *See* Jeff Jacobs, *Forget Rest; 1979 Draft Best of All*, HARTFORD COURANT, June 27, 1994, at E1.

13. Philadelphia, ironically, provided Quebec with such an abundance of young talent in return for Lindros that Quebec — now the Colorado Avalanche — has become one of the league's best teams, finishing the 1994-95 season with the Eastern Conference's best record in the regular season. *See* Red Fisher, *A Little of Everything in Unique Cup Playoffs*, MONTREAL GAZETTE, May 6, 1995, at E3. Philadelphia traded Mike Ricci, Ron Hextall, Peter Forsberg, Steve Duchesne, Kerry Huffman, Chris Simon, their 1993 and 1994 first round draft choices

comparison to the salary cap and luxury tax) in the recent NHL players' strike that cancelled nearly half of the 1994-95 season. As in the other sports, the players prefered a shorter draft while the owners fought for, and obtained, a rookie salary cap.

This article will discuss the amateur drafts of the four major team sports. It will begin with the case of *Smith v. Pro Football, Inc.* and with an antitrust analysis of the draft's restraint of trade (which is relevant for all team sports except baseball, which currently has an antitrust exemption[14]). This section will also include a critical look at the *Smith* decision and weaknesses in the reasoning of the circuit court. Much of part two will support the amateur draft and criticize the *Smith* majority. Part three will focus on the debate among economists as to whether the amateur draft actually succeeds in promoting a competitive balance. It will discuss the major problems with the draft and how, in practice, the draft is not necessarily the best suited means to achieve the leagues' stated goals. The article will next examine some of the collective bargaining agreements which have protected the drafts from further legal challenge. This section will briefly discuss the role of player unions and their right to negotiate agreements which restrain the trade of those who are not yet members of the unions (or, in the case of the MLBPA's attack on the draft modification to extend the exclusivity period, the union's creation of standing to challenge the change). The fifth section will look at different options that have been proposed by the *Smith* court, various sportswriters and the leagues themselves and will discuss some of the positive and negative aspects of each option. Finally, the last section will present a new proposal for the amateur draft.

II. THE YAZOO SMITH CASE

The *Smith* decision, the only one directly attacking the validity of the amateur draft in any major team sport,[15] held that the NFL draft vio-

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(who turned out to be, respectively, Jocelyn Thibault and Nolan Baumgartner) and $15 million in cash to Quebec for the rights to Lindros. Chuck Gormley, USA TODAY, May 5, 1995.

14. Baseball's antitrust exemption has come from a trilogy of Supreme Court cases: Federal Baseball Club of Baltimore, Inc. v. National League of Professional Baseball Clubs, 259 U.S. 200 (1922); Toolson v. New York Yankees, Inc., 346 U.S. 356 (1953); and Flood v. Kuhn, 407 U.S. 258 (1972).

15. In Denver Rockets v. All-Pro Management, Inc., 325 F. Supp. 1049 (C.D. Cal. 1971), the court granted Spencer Haywood a preliminary injunction forbidding the NBA from denying him entry in the NBA's amateur draft by reason of his not having graduated from college. The case was never litigated beyond the injunction stage, but in granting a preliminary injunction, the court opined that there was a "substantial probability" that the amateur draft was an "arbitrary and unreasonable restraint" of trade in violation of the antitrust laws. *Id.* at 1056.

lated the Sherman Act.[16] As a direct result, the professional sports leagues (with the exception of baseball which, as noted earlier, is exempt from the antitrust laws) have been required to elicit the permission of the player unions to continue their drafts.[17] The NFL appealed its initial loss in the district court but was rebuffed by a 2-1 opinion of the D.C. Circuit affirming the finding of antitrust liability.

Although the district court in *Smith* found a *per se* violation of the Sherman Act by virtue of its belief that the draft constituted an unlawful "group boycott," the court of appeals rejected that characterization and held the draft to be invalid under a rule of reason analysis.[18] The circuit court rejected the trial court's *per se* condemnation and concluded that the draft could not constitute a "group boycott" because football teams are not economic competitors. According to the court, the rule of reason analysis was thus necessary because "courts have consistently refused to invoke the boycott per se rule where, given the peculiar characteristics of an industry, the need for cooperation among participants necessitated some type of concerted refusal to deal."[19] This conclusion seems to find support in the subsequent Supreme Court decision in *National Collegiate Athletic Association v. Board of Regents of the*

The court in Drysdale v. Florida Team Tennis, Inc., 410 F. Supp. 843 (W.D. Pa. 1976), granted standing to a tennis player to challenge the draft under the Sherman Act, but never reached the merits of the claim.

16. The provisions of the Sherman Act that formed the bases of the complaint in *Smith* were 15 U.S.C. § 1, which provides that "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal . . . ," and 15 U.S.C. § 3, which reads similarly. Although not addressed by either the District Court or the D.C. Circuit, Smith's complaint also alleged a violation of 15 U.S.C. § 2, which provides that "[e]very person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony . . . ."

17. The *Smith* decision obviously affects only the NFL directly, as the NBA and NHL were not parties to the action, but the latter two leagues have also dealt with draft-related issues through collective bargaining. *See* Robertson v. National Basketball Ass'n, 556 F.2d 682 (2d Cir. 1977); Wood v. National Basketball Association, 602 F. Supp. 525 (S.D.N.Y. 1986); Bridgeman v. National Basketball Ass'n, 675 F. Supp. 960 (D.N.J. 1987); and Zimmerman v. National Football League, 632 F. Supp. 398 (D.D.C. 1986). In the only hockey case challenging the amateur draft, the First Circuit dismissed a complaint because personal jurisdiction over the NHL was lacking in Rhode Island. Donatelli v. National Hockey League, 893 F.2d 459 (1st Cir. 1990).

18. Under *per se* condemnation, applied when the court finds a "group boycott," the court ignores all potential pro-competitive justifications because the purpose of the condemned action is to affect prices. On the other hand, a rule of reason approach looks at the market power of the actor and possible redeeming virtues of the alleged restraint, as well as less restrictive alternatives.

19. Smith v. Pro Football, Inc., 593 F.2d 1173, 1180 (D.C. Cir. 1978) (footnote omitted).

University of Oklahoma (NCAA).[20] There, the Court declined to find a *per se* violation by the National Collegiate Athletic Association (NCAA) because the majority believed that "what is critical is that this case involves an industry in which horizontal restraints on competition are essential if the product is to be available at all."[21] However, the *NCAA* Court still found an antitrust violation, under the rule of reason approach, in the NCAA's policy of limiting television appearances by member schools.[22]

Using a rule of reason analysis, the D.C. Circuit in *Smith* held that the draft violated the Sherman Act. The court questioned the correlation between the draft and on-field competition, suggesting the existence of a stronger relationship between competition and other factors such as the sharing of television revenues and the ability of individual coaches. The dissent disputed this vigorously.[23]

The most troubling aspect of the *Smith* court's opinion was an ensuing paragraph in which the court stated that any procompetitive effect on the field could not be balanced against the anticompetitive effect on the player market.[24] The court reasoned that NFL teams are not economic competitors on the playing field (thus, it had concluded earlier that there was no *per se* violation). As a result, greater competition on the playing field "does not increase competition in the economic sense of encouraging others to enter the market," thus "the draft's demonstrated procompetitive effects are nil."[25] Therefore, according to the D.C. Circuit, the

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20. 468 U.S. 85 (1984).

21. *NCAA*, 468 U.S. at 101.

22. On the other hand, it can be argued that the "group boycott" definition used by the D.C. Circuit in *Smith* — "a concerted attempt by a group of competitors at one level to protect themselves from competition from non-group members who seek to compete at that level," *Smith*, 593 F.2d at 1178 (footnote omitted) — is too narrow in light of the subsequent Supreme Court decision in Federal Trade Comm'n v. Superior Court Trial Lawyers Ass'n, 493 U.S. 411 (1990). There, the Court found a *per se* violation even though the boycotting group was not attempting to restrain competitors but rather sought to improve their members' market salaries. However, I would still agree with the D.C. Circuit's conclusion that NFL teams are not true economic competitors. *Cf.* Los Angeles Memorial Coliseum Comm'n v. National Football League, 726 F.2d 1381 (9th Cir. 1984) (denying single entity status to the NFL).

23. Without going into much discussion, I believe that the major flaws in the court's reliance on the equalizing ability of these two factors are that (i) revenue sharing could not alleviate the problems caused by such limited free agency as the NFL then had since there is only so much a bad team can do with equal revenues without access to better players, and (ii) the court overestimated the impact a coach makes on an untalented team.

24. *Smith*, 593 F.2d at 1186.

25. *Id.*

anticompetitive effects on the market for players' services and the procompetitive effects on athletic competition could not be balanced.[26]

I find such a statement stunning. If the court is correct, the effects on the players' market and the effects on the field can never be balanced. Were this the case, no procompetitive effects that increase athletic competition are ever of any significance. But surely some rules that have some negative effect on the players market are necessary for athletic competition. These rules include suspension or expulsion for gambling[27] or drug violations,[28] as well as basic eligibility requirements.[29]

Just a few months after the *Smith* decision, the Supreme Court decided *Broadcast Music, Inc. v. Columbia Broadcasting System (BMI)*.[30] In *BMI*, the Court permitted blanket licenses for musical compositions,

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26. In Sullivan v. National Football League, 34 F.3d 1091 (1st Cir. 1994), the First Circuit pondered whether the anticompetitive effects in one market could be balanced with the procompetitive effects in another. *Id.* at 1111-12. The court, which ultimately declined to answer the question as unnecessary to its decision, called the "issue of defining the proper scope of a rule of reason analysis [ ] a deceptive body of water, containing unforeseen currents and turbulence lying just below the surface of an otherwise calm and peaceful ocean." *Id.* at 1111. The *Sullivan* court blamed some of the outstanding confusion on the Supreme Court, which in *NCAA* "considered the value of certain procompetitive effects that existed outside of the relevant market in which the restraint operated." *Id.* (citing *NCAA*, 468 U.S. at 115-20). The First Circuit expressed uncertainty as to "whether the [*NCAA*] Court was consciously applying the rule of reason to include a broad area of procompetitive benefits in a variety of markets, or whether the Court was simply not being very careful and inadvertently extending the rule of reason past its proper scope." *Id.* at 1111 n.9. The First Circuit, before deciding not to decide, agonized over the issue, first stating that "it seems improper to validate a practice that is decidedly in restraint of trade simply because the practice produces some unrelated benefits to competition in another market," but then recognizing that "[o]n the other hand, several courts, including this Circuit, have found it appropriate in some cases to balance the anticompetitive effects on competition in one market with certain procompetitive benefits in other markets." *Id.* at 1112 (citing *NCAA*, 468 U.S. at 115-20; Grappone, Inc. v. Subaru of New England, Inc., 858 F.2d 792, 799 (1st Cir. 1988); M & H Tire Co. v. Hoosier Racing Tire Corp., 733 F.2d 973, 986 (1st Cir. 1984); Los Angeles Memorial Coliseum Comm'n, 726 F.2d at 1381, 1392, 1397, 1399).

27. *See* Molinas v. National Basketball Association, 190 F. Supp. 241 (S.D.N.Y. 1961) (upholding the league's right to suspend — and refuse reinstatement to — a player who bet on his team to win)

28. This is particularly true for violations of steroid abuse regulations. As steroids are performance-enhancing drugs, their prohibition must be for the purpose of maintaining fair *on-field* competition. Yet players are denied the freedom to use this means to increase their individual market value. The only player challenge to the NFL's anti-steroid regulations was not even on antitrust grounds, but rather on constitutional grounds, and was dismissed. Long v. National Football League, 870 F. Supp. 101 (W.D. Pa. 1994).

29. This seemed to be a given for the Supreme Court in its ruling in *NCAA* when the Court stated that "the integrity of the 'product' cannot be preserved except by mutual agreement; if an institution adopted such restrictions unilaterally, its effectiveness as a competitor on the playing field might soon be destroyed." *NCAA*, 468 U.S. at 102.

30. 441 U.S. 1 (1979).

noting that such licenses, in effect, created a new product which would not be available in their absence. Citing *BMI* for the proposition that joint agreements may be procompetitive because they increase total output, the *NCAA* Court noted that "[r]espondents concede that the great majority of the NCAA's regulations enhance competition among member institutions."[31] In sports, such joint actions to increase competition on the playing field would, hopefully, result in greater media attention and overall fan interest.[32]

After opining that the on-field procompetitive virtues of the NFL draft could not be considered under a balancing test, the *Smith* court seemingly contradicted itself in stating that "some type of player selection system might be defended as serving 'to regulate and promote . . . competition' in the market for players' services."[33] This is curious because if the court is to be taken seriously in its initial statement that all defenses based on increased on-field athletic competition are unavailing, then even the lesser restrictive draft alternatives proposed by the court must still be invalid since they too still impose *some* restraint on the players' market while the corresponding benefit is to on-field competition.[34] While the court listed a number of proposed alternatives (all of which would still have some anticompetitive impact on the players' market and a potential on-field competitive benefit), the court refused to "intimat[e] any view as to the legality" of these proposals.[35]

Judge MacKinnon, in his *Smith* dissent, pointed out that competitive equality is necessary for any sports league to survive. While the majority did not dispute that point, it questioned whether or not the draft was necessary to promote this balance. Although empirical data to prove or disprove this argument is lacking because drafts have existed in all major

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31. *NCAA*, 468 U.S. at 103. The NCAA lost, however, because the Court ultimately found that the particular regulation in question neither created a new product nor increased the overall volume of television rights. *NCAA*, 468 U.S. at 113.

32. There is little dispute that increased on-field competition benefits the league. *See* Roger Noll, *Attendance and Price Setting*, *in* GOVERNMENT AND THE SPORTS BUSINESS 122-23 (Roger G. Noll ed., 1974) ("aggregate league attendance will be substantially higher if several teams alternate in winning pennants than if one team tends to dominate."); Lewis Kurlantzick, *Thoughts on Professional Sports and the Antitrust Laws:* Los Angeles Memorial Coliseum Commission v. National Football League, 15 CONN. L. REV. 183, 193 (1983) ("the creation of competitive balance will, in turn, increase fan enjoyment"); Horowitz, *Sports Broadcasting*, *in* GOVERNMENT AND THE SPORTS BUSINESS 303 (Roger G. Noll ed., 1974) ("an equal split that strengthens some of the clubs financially without hurting others will presumably tend to equalize competition, and thereby enhance the profits of all clubs.").

33. *Smith*, 593 F.2d at 1187 (footnote omitted).

34. These alternatives will be discussed in Part Five, *infra.*

35. *Smith*, 593 F.2d at 1187.

sports for many years, it is nonetheless difficult to accept the trial court's argument (endorsed by the D.C. Circuit) that "*no* correlation was demonstrated between the draft and the survival of the League."[36] A few examples show the significant impact of the draft. First, as Judge MacKinnon's dissent argued, the draft preference for the Montreal Canadians had a major impact on the National Hockey League.[37] Second, both the NFL and NBA have provided recent examples of the potentially significant impact of the draft. Look, for example, at the 1989 trade between the Dallas Cowboys and Minnesota Vikings involving Herschel Walker, one of the top running backs in the game at that time. Few people will dispute that the high number of first and second round draft choices Minnesota gave to Dallas in exchange for Walker was the cause of Dallas' extraordinary rise from a one and fifteen record to the playoffs and ultimately to successive back-to-back Super Bowl championships and of a nearly corresponding decline in Minnesota's fortunes.[38] The *Smith* majority's alternative explanation that coaching changes have a major impact on a team's success certainly does not explain Dallas' turnaround as Dallas replaced the legendary Tom Landry.[39] In the NBA, the meteoric rise of the expansion Orlando Magic to the playoff finals in 1994-95 can be attributed primarily to the team's good fortune of having the first overall draft pick in consecutive years (1992 and 1993) and, therefore, of obtaining Shaquille O'Neal and Anfernee Hardaway, the latter having been the third overall pick and acquired from Golden

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36. *Smith*, 593 F.2d at 1183 n.46 (emphasis added). One commentator argues against the baseball draft's impact by citing a number of star players who were not high draft choices, such as Roger Clemens, Nolan Ryan, Ryne Sandberg and Jose Canseco. *See* Deborah Spander, *The Impact of Piazza on the Baseball Antitrust Exemption*, 2 UCLA ENT. L. REV. 113, 143 (1994). Her conclusion, however, that "MLB teams have the same probability developing a future major league player from an undrafted free agent," *Id.*, goes way beyond her evidence. While there are notable exceptions, I would take a team of randomly selected first round draft choices over one of randomly selected amateur free agents any day.

37. *Smith*, 593 F.2d at 1198 n.33 (MacKinnon, J. dissenting).

38. In the October 12, 1989 trade, the Minnesota Vikings traded five players, a number one draft pick and six conditional draft picks to Dallas for Walker. Through subsequent trades, Dallas ultimately obtained Emmitt Smith, Russell Maryland, Kevin Smith and others as a direct result of this deal. Mike Fisher, *Super Deal Was Daddy of Them All: Cowboy's Trade Failures Pale in Comparison to the Herschel Walker Swap to the Vikings*, FORT WORTH STAR-TELEGRAM, Apr. 21, 1993. However, not all trades of superstars for a bounty of draft choices have the same success. *See* Jim Thomas, *Exile from Success Mystifies Rams: 5 Years Ago, Super Bowl Was in Sight*, ST. LOUIS POST DISPATCH, Sept. 8, 1995, at 1D ("Almost any discussion of the Rams' demise begins and ends with the Eric Dickerson trade," in which the Rams traded Dickerson in October 1987 to the Indianapolis Colts in exchange for three first-round and three second-round draft choices).

39. Landry, ironically, was one of the star coaches cited by the *Smith* court as positively affecting a team's fortunes. *Smith*, 593 F.2d at 1185 n.46.

State for Orlando's top choice, Chris Webber.[40] While inept drafting and coaching can eliminate the benefits of high draft choices and while skillful scouting and coaching can help the best teams remain on top, by and large, the draft does promote competitive balance even if not to its maximum potential.[41] The problem lies not in the draft's failure to promote equality on the playing field but its corresponding restriction on the freedom of amateur athletes.

The major sports leagues do not merely pay lip service to the notion that the draft is necessary for a competitive balance. For example, in baseball, teams forfeit or gain first round draft choices as compensation when they sign or lose free agents. In football, teams that sign players from the supplemental draft sacrifice choices in the regular draft.[42]

One of the most compelling arguments presented by Judge MacKinnon in his dissent is that the draft does indeed have redeeming virtues for the players. The first benefit to some players is the status of being a high draft choice (lower round draft choices will be discussed in Part Five, *infra*).[43] Even though drafted players are prevented from negotiating with other teams, the teams likewise are barred from negotiating with other drafted players. Thus, both sides have similar restrictions. Teams may pay greater amounts than what the free market would otherwise dictate because of an extreme need at a particular position or because of pressure from fans to avoid losing a high draft choice.

As a New Yorker, two recent examples that leap to my mind are the New Jersey Nets' signing of Kenny Anderson and the New York Yankees' signing of Brien Taylor, which have had markedly different results. With Anderson, the Nets faced considerable pressure from a number of fronts: the media, the heavy dependence on the potential increased ticket sales (Anderson was a popular local product), the team's weakness at his point guard position, the potential fan backlash because of the talented players they chose not to draft (such as Dikembe Mutombo and Billy Owens), and the need for a point guard (the offensive 'quarterback') to sign early to learn the offense.[44]

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40. Bob Remy, *Questions and Answers*, NEW ORLEANS TIMES-PICAYUNE, June 11, 1995, at C2. *See also supra* note 13 (describing the rise of the NHL's Quebec Nordiques through the amateur draft).

41. The extent of which will also be discussed in Part Five, *infra*.

42. The arguments advanced by the MLBPA in its challenge to baseball's amateur draft modification demonstrates the Union's concurrence as to the valuable role the draft plays.

43. In fact, given a choice between being drafted and being an undrafted free agent, players clearly seem to prefer to be drafted. *See infra* note 97.

44. The pre-draft drama and anticipation as to whether the Nets would draft Anderson with the second overall pick was intense, with the local New York press often devoting multi-

As a result, after long and drawn out negotiations, the Nets signed Anderson to a five year, $15 million contract.[45] While it is obviously a matter of speculation, odds are that Anderson would not have received such a rich deal outside of New York because his value would have been significantly less without the local appeal and the pressure on Nets' management not to lose out on its gamble to take Anderson rather than the other talented players available. The draft thus contributed to his high salary.

The case of Brien Taylor provides equally compelling evidence. As the number one draft choice in the nation in 1991, Taylor received daily media attention in New York. As the Yankees had not had the first overall choice in decades, there was considerable pressure[46] to meet his demands (and Taylor's race, made a factor by his mother, added pressure) and Taylor eventually received a $1.55 million signing bonus, an unheard of sum of money in a sport in which top draft picks routinely fail to star in the major leagues and, in any event, often take years to get there.[47] The further threat that Taylor (and many other high school

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ple articles to the subject on a single day. *See, e.g.*, Dave Anderson, *Nets Risk Missing Shot at Anderson*, N.Y. TIMES, June 26, 1991, at B1; Jack Curry, *Nets Dilemma: Is It Anderson or Owens?*, N.Y. TIMES, June 26, 1991, at B2. Following the Nets selection of Anderson, the national media was quick to report the risk taken in the selection. *See, e.g.*, Jack Curry, *Nets Take a Dare and Go for Stylish Anderson*, N.Y. TIMES, June 27, 1991, at B5; Mark Heisler, *Beyond 6 Players, It's a Reach NBA Draft*, L.A. TIMES, June 27, 1991, at Part C ("The No. 2 pick wound up in a palace counter-revolution, with Nets ownership bowing to pressure to take the local favorite, stepping in at a late meeting to argue for hometown legend Kenny Anderson of Georgia Tech rather than Syracuse's Billy Owens."); Anthony Cotton, *Johnson No. 1 to Hornets*, WASH. POST, June 27, 1991 (Anderson's surprising selection by the Nets over Owens sent "the crowd at Madison Square Garden into a frenzy over the standout from Queens.").

45. Anderson, who did not sign with the Nets until the beginning of the season, thus missing the entire pre-season, annoyed Nets coach Bill Fitch even further by his salary demands, which forced the Nets to cut two other players merely to fit Anderson below the salary cap. *Around the NBA*, WASH. POST, Nov. 9, 1991, at D7 (quoting Fitch as saying "[i]t absolutely stinks that here we are after going through training camp what we have to give to get a great player like this in terms of a Jud Buecheler being gone and a Dave Feitl being gone"); Michael Arace, *Rookies Face Major Adjustment to NBA*, L.A. TIMES, Nov. 3, 1991, at C5 (stating that "[r]ookies holding out of camp can ruin their first pro season" and quoting one coach as saying that Anderson "could 'lose' half to three-quarters of his rookie year making adjustments . . . because he held out of training camp.").

46. For example, even Yankees owner George Steinbrenner, serving a "lifetime" ban at the time, publicly stated, "my people . . . ought to be shot" if they failed to sign Taylor. Murray Chass, *Farm Bosses Want Kuhn, but Majors Balk*, N.Y. TIMES, Sept. 1, 1991, at 7.

47. The Yankees drew broad criticism for the magnitude of Taylor's signing bonus. *See* ANDREW ZIMBALIST, BASEBALL AND BILLIONS 100-101 (1992) (quoting Astros' general manager Bill Wood as saying, "I was disappointed . . . On one side, every club has to do what it has to do to improve, but there is sadness at the realization of the impact of the [signing] on the industry and other clubs . . . [In the past small-market teams could choose] not to slug it out in

players) had against the Yankees was that he could drastically shorten the traditional one-year signing period to only a few months by threatening to go to college. Once a player enrolls in a university, teams are no longer permitted to negotiate with him. By using this threat, Taylor was able to increase the pressure on the Yankees (as Todd Van Poppel, the first million dollar draft choice, did with the Oakland A's a year earlier).[48]

Another advantage of the amateur draft for players is that the draft provides them with a means to determine their value relative to other draft choices both from that year and from previous years. Players rarely risk signing for too little money because their agents can set minimum demands based on full knowledge of the relative market. An example of this is Jeff George, the top pick by the Indianapolis Colts in the 1990 NFL draft. Leigh Steinberg, George's agent, was quoted as saying that because of George's position in the draft, George was worth no less than the amount the previous year's number one pick had received and that Steinberg would attempt to begin negotiations at that level.[49]

The *Smith* dissent, while persuasive generally, exaggerated significantly in arguing that "the NFL must compete with businesses and other careers for the best graduating college players."[50] While few, if any, star athletes today choose to forego lucrative professional athletic careers to become lawyers, doctors or non-athletic professions, for the talented few, athletic alternatives exist. Judge MacKinnon notes that some athletes are good enough to play more than one sport.[51] Additionally, there are other leagues that may offer lucrative alternatives. There are professional basketball and hockey leagues in Europe, high profile junior

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the big free-market [and could always turn to the amateur draft;"] Padres' general manager Joe McIlvaine as saying, "[t]hat's just scary;" and Phillies' owner Bill Giles as saying, "[y]ou look at the big picture, it's another nail in the financial coffin."). Only 10% of all minor league players ever make the major leagues. *Id.* at 106.

48. Van Poppel had insisted that he would attend the University of Texas, which scared all of the poorer teams from wasting a pick drafting him; the defending champion A's decided to take a chance, drafted him, offered him over $1 million and signed him. *See* Jerome Holtzman, *Owners Welcome 2, Ponder Fate of 1*, CHI. TRIB., Sept. 13, 1991, at 9.

49. This statement was repeated by Ed Garvey, former head of the National Football League Players Association, in a 1990 speech given at Harvard Law School.

50. *Smith*, 593 F.2d at 1215 (MacKinnon, J. dissenting).

51. *Id.* (McKinnon, J., dissenting). While this may not have been prevalent in 1979 when *Smith* was decided, it has grown immensely in the last decade with such athletes as Danny Ainge, Bo Jackson, Deion Sanders, Brian Jordan and even Michael Jordan playing professionally in two sports recently and many more considering doing so.

hockey leagues in Canada, and the Canadian Football League (CFL).[52] While most players might not make as much money by pursuing one of these alternate avenues (although some athletes, such as Raghib Ismael in the CFL, Dominique Wilkins in Greece and a number of baseball players in Japan, do make more than they would have earned in the United States), the mere threat of a foreign offer is often sufficient to induce higher offers from major U.S. sports teams.[53]

A *BMI*-type argument can be made regarding the draft. Because of all of the media attention the draft receives — the coverage of the lottery drawing in the NBA (which the NHL hopes to duplicate), the live telecasts of the NBA and NFL drafts, the coverage of and enormous speculation about superstars such as Eric Lindros, Brien Taylor and Patrick Ewing, and the publicity the media provides to local teams concerning their draft strategies and picks — the league's product is enhanced. This extra prestige and publicity brings in extra revenues which ultimately goes back to the players themselves (either indirectly because the teams have more to spend or directly because of revenue sharing agreements). Thus, the draft has independent value.

III. The Debate Among Economists

During the last two decades, the amateur draft has been the subject of extensive writing, speculating and mathematical computing. To the average fan, it seems logical that the draft helps to equalize playing strengths. However, to many economists, the draft does not do so but instead serves merely to distribute wealth among owners by allocating playing strengths so as to maximize league profits.[54] Gerald W. Scully

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52. Leigh Steinberg, one of the most well-known football agents, dismisses the CFL option, arguing that the "CFL is frequently an unsatisfactory alternative since it restricts the number of U.S. players that a team can sign, its pay structure is generally uncompetitive with the NFL's scale, and the Canadian income tax laws subject U.S. players to certain adverse tax consequences." Steinberg, *supra* note 1, at 623.

53. Wilkins signed a two-year, $7 million contract, the most lucrative ever for a European player, that even he characterized as "too sweet [that he] would have been a fool to turn it down." Ailene Voisin, *'Nique's a Greek, Wants to Finish a Hawk*, Atlanta Constitution, Sept. 12, 1995, at B2. *See also* Frank Blackman, *Neel Not Hitting It Off With Japan; Ex-A's DH Finds Adjustment to Baseball There*, San Francisco Examiner, May 14, 1995, at D5 (stating that, even without a baseball strike in the United States, Troy Neel, who signed a two-year, $2 million contract to play in Japan, "could never earn that kind of money in the U.S.").

54. This argument is analogous to the view many economists take with respect to the effect of the former era of the reserve clause in baseball. These scholars argue that under the reserve clause, talent was distributed no differently than under free agency. In both time periods, talent was distributed in an optimal way so as to maximize overall league profits but during the era of the reserve clause, the smaller-market teams received payments from the

summarizes this position.[55] He notes that while each team has an incentive to be among the league's best, there is a certain distribution of winning percentages that maximizes overall league profits. However, the standard collective action problem prevents teams from acting to maximize league revenues, because such action often does not provide a certain and tangible benefit to the individual team acting.[56] But the draft serves to distribute players in a way that will best allocate the player strengths and, according to Scully, internalize the externalities.[57]

Henry G. Demmert concurs that there are externalities that teams often do not consider.[58] Demmert argues that "the improvement of a poor team results in benefits to the league as a whole over and above those which accrue to that individual club. It cannot be expected that the club will consider these external effects of its decisions in determining the level of its team's quality."[59]

Demmert ultimately concludes, however, that the amateur draft fails in its attempt to distribute talent in the best way. He argues that the actual effects of the draft are insignificant for a few reasons. First is the way draft choices are allocated. Because teams draft in the reverse order of the final standings the prior year, the worst team in the league receives the highest pick in each round and the best team receives the lowest pick. However, with the single exception of the first pick overall, the best team gets talent equal to the worst team (actually, it gets one player better each round).[60] Demmert also asserts that scouting is at least as important as draft position because of the difficulties in predict-

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larger-market teams (in the form of cash sales) whereas with free agency, these payments are made to the players instead (in the form of higher salaries). *See* Jeffrey A. Rosenthal, *The Football Answer to the Baseball Problem: Can Revenue Sharing Work?*, 5 SETON HALL J. SPORT L. 419, 426 (1995).

55. *See* GERALD W. SCULLY, THE BUSINESS OF MAJOR LEAGUE BASEBALL (1989).

56. *See* Stephen F. Ross, *Monopoly Sports Leagues*, 73 MINN. L. REV. 643, 687 (1989) ("In economic terms, league balance, like national defense, is a 'public good.' Although league balance benefits all teams, no individual team has any incentive to work toward it."); Rosenthal, *supra* note 54, at 428. *But see* George Daly & William J. Moore, *Externalities, Property Rights and the Allocation of Resources in Major League Baseball*, 19 ECONOMIC INQUIRY 77, 80-81 (1981) ("team owners are surely aware of these effects; the number of teams is not large and, hence, free-rider effects are not inevitable; a central organization (the league) is available to coordinate activities and prescribe allocative rules; collusion among teams is, uniquely, legal in the industry and detection of violators of collusive agreements remarkably easy.").

57. Scully, *supra* note 55, at 85.

58. *See* HENRY G. DEMMERT, THE ECONOMICS OF PROFESSIONAL TEAM SPORTS (1973).

59. *Id.* at 29.

60. This is because, in a 30-team league (such as the NFL), the worst team has picks 1, 31, 61, 91, etc. while the best team has 30, 60, 90, etc. After the number 1 pick, the best team gets 30 while the worst gets 31, the best gets 60 while the worst gets 61, and so on.

ing future success. Finally, Demmert is most critical of the marketability of draft choices.[61] As an example, he cites the NHL in the early 1970's when the Los Angeles Kings, who had the second to worst record in 1971, had no first round draft picks until 1975 and the Montreal Canadians, the most dominant team in the league, had ten first round choices in the three year period from 1971 to 1973.[62]

A drastically different opinion was expressed by George Daly and William J. Moore.[63] Daly and Moore studied Major League Baseball during the ten-year period before the imposition of the amateur draft in 1965 and the ten-year period afterwards. They compared the number of teams winning pennants before and after the imposition of the draft, the winning percentage range of teams, the dominance of large-city teams and the amount of contracts sold or transferred between teams. While acknowledging other possible factors for some changes (such as the decline of the New York Yankees who, I believe, had so dominated play previously as to distort potentially any reasonable comparison),[64] Daly and Moore concluded that the draft did serve to equalize talent. They wrote:

> [t]he desire of owners to maximize their wealth provides them with incentives to produce competitions more equal than would result from the independent behavior assumed by the traditional literature. . . It is both possible and plausible that this rules structure influenced the distribution of playing talent among teams and, specifically, made that distribution more equal and, perhaps, more profitable than it would otherwise have been.[65]

Unfortunately, there are several weaknesses in the debate among the economists. First, they have not studied the corresponding effect of the

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61. This is not true in Major League Baseball, the only sport in which draft choices are not transferable. *See* MAJOR LEAGUE BASEBALL PROFESSIONAL RULES BOOK § 4(c) (1988) [hereinafter BASEBALL RULES].

62. Demmert, *supra* note 58, at 36-37. Similar conclusions have been reached by other researchers such as James Quirk and Mohamed El Hodiri ("by limiting competition for newly recruited players, [the draft] reduces the cost to the entire league of such players. . . [and] does not, however, lead to equalization of playing strengths") (James Quirk & Mohamed El Hodiri, *The Economic Theory of a Professional Sports League*, *in* GOVERNMENT AND THE SPORTS BUSINESS, *supra* note 32, at 40), and Roger G. Noll ("restrictive practices do not primarily serve to control the differences in quality among teams within a league") (Roger G. Noll, *The U.S. Team Sports Industry: An Introduction*, *in* GOVERNMENT AND THE SPORTS BUSINESS, *supra* note 32, at 32).

63. *See* Daly and Moore, *supra* note 56.

64. Andrew Zimbalist, however, attributes the decline of the dominant Yankees, in part, to the introduction of the amateur draft. Zimbalist, *supra* note 47, at 100.

65. Daly and Moore, *supra* note 56, at 84.

draft on player salaries, the primary harm alleged. While some economists have commented or speculated about the impact, none have performed the empirical research that was done in other areas. A second major problem, as Daly and Moore acknowledge, is that there may be alternative explanations for increased or decreased competition, including free agency, the end of the reserve clause, ownership changes, wars (resulting in players literally being drafted for military service), franchise shifts and expansion. Finally, there is inconsistency in defining competition, as some economists choose winning percentage, some calculate based upon championships won, while others look at the closeness of individual games.

IV. Player Unions and the Draft

Negotiations between sports owners and players' unions concerning the draft are quite interesting in that amateur players are not always represented by the unions. In baseball, players are not members of the union until they reach the major league level (thus, the baseball players' strikes have not affected minor league baseball).[66] In the other sports, while the unions can and do bargain with respect to amateur draftees, the affected constituency has no voice among union membership.[67] Yet, as the Second Circuit noted in *Wood v. National Basketball Association*,[68] collective bargaining agreements that affect parties outside the bargaining unit are commonplace.[69] In *Wood*, Judge Winter analogized the college draft to a situation in which the union grants permission for hiring halls to refer workers exclusively to particular employers at particular wages.[70]

However, the Second Circuit's analogy is not so persuasive. In the traditional labor context, such institutions as wages, seniority and work conditions affect all employees relatively equally, although it is true that a wage scale in which the newest employees are paid the least harms the newer employees who did not have a chance to participate in the union's consideration. However, in such situations, some employees always represent that interest; in that case, the junior-most employees at that particular time represent new employees.

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66. Zimbalist, *supra* note 47, at 179.
67. *Id.* at 180.
68. 809 F.2d 954 (2d Cir. 1987).
69. *Wood*, 809 F.2d at 960.
70. *Id.*

The college draft, on the other hand, is unique in that nobody within the union is competent to represent the amateur. Even the most junior member of a sports union is already past the stage in which a poor agreement concerning the amateur draft would affect him.[71] Thus, there is virtually nothing to prevent the union from giving a little extra to the owners when negotiating about the amateur draft in return for concessions in other areas such as free agency for veterans. It is no surprise, therefore, that rookie salary caps have been enacted recently, or may soon be enacted, in most sports. The *Wood* court speaks of the "duty of fair representation,"[72] but to what extent does that apply to those who are outside the scope of the union's current membership? Additionally, even if there is such a duty toward amateurs, it is doubtful that any court will strike down a collective bargaining agreement because the negotiations concerning the amateur draft were not as good as they could have been. Asking a court to measure how strongly the union negotiated on a particular issue is a monumental, if not impossible, task.[73]

On the other hand, the draft is integrally related to many of the other things that the union negotiates in the collective bargaining agreement, particularly veteran free agency. Four potential scenarios exist concerning players' negotiating rights: 1) open amateur bidding and limited veteran free agency, 2) open amateur bidding and open veteran free agency, 3) restricted amateur draft and open veteran free agency, and 4) restricted amateur draft and limited veteran free agency. Were the union forbidden from negotiating a collective bargaining agreement affecting amateurs and, therefore, all amateurs were unrestricted free agents, either scenario one or two would exist. Scenario two would likely be an unacceptable situation for the owners while scenario one would be unacceptable for the veteran players. Scenario one would re-

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71. It is difficult to analyze the precise effect rookie salaries would have on veterans and, thus, the view veteran players (who comprise the body of player union membership) take toward amateurs. On one hand, higher rookie salaries should mean that veterans, with proven worth, would get paid even more while, on the other hand, because team salary caps in some sports create a "limited pie," every extra dollar going to rookies would mean one less dollar available to veterans.

72. *Wood*, 809 F.2d at 962.

73. Michael S. Kagnoff ponders whether the recent NFL Agreement, with the inclusion of a rookie salary cap, violated the NFLPA's duty of fair representation. Kagnoff argued that, because the NFL adopted an overall salary cap for each team, the interests of veterans and rookies became diametrically opposed in that their salaries would come out of the same limited pie. The overall salary cap for each team eliminated any need for the owners to receive a rookie salary cap as well. The NFLPA was dominated by veterans and, therefore, had an "unusually strong incentive to negotiate an exceptional deal for veteran players." Kagnoff, *supra* note 9, at 139.

sult in a rather lopsided situation in which only the rookies would be free to negotiate. Such a situation could have the perverse result of escalating rookie salaries at the expense of established veterans. The alternative to that, scenario two, is unlikely since owners would not be inclined to grant unrestricted free agency to veterans solely because rookies would have it. Thus, the only realistic solutions to maintain some sort of equilibrium between the owners and players (and between veterans and rookies) involve some restrictions on the allocation of amateur players. To reach an optimal balance between veterans and rookies, the union necessarily would have to be the representative body in negotiations with management.[74]

As mentioned earlier, Major League Baseball's draft change to extend the period of exclusivity with regard to high school players was successfully challenged by the MLBPA. As noted, MLB has an antitrust exemption and, therefore, is completely unaffected by *Smith*. Therefore, union consent was legally unnecessary for baseball to maintain or modify the draft. Further adding to the MLBPA's difficulty was the fact that, unlike in other sports, baseball draftees nearly always join the minor leagues and, therefore, are not union members.

Two challenges against MLB's draft modification were mounted. The first was from Scott Boras, the agent responsible for many of the high bonuses in recent years.[75] While Boras had no real standing to

74. One area of litigation between players and leagues recently has been the effect on the amateur draft of the expiration of a collective bargaining agreement. As a result of this fiercely contested litigation during the past few years, clear case law has been developed in that the amateur draft remains legally valid after the expiration of collective bargaining agreements and even after an impasse is reached. In National Basketball Ass'n v. Williams, 45 F.3d 684 (2d Cir. 1995), the Second Circuit held that the NBA was permitted to continue the terms of an old collective bargaining agreement after expiration until the parties negotiated to an impasse, at which time "the nonstatutory labor exemption precluded an antitrust challenge to various terms and conditions of employment implemented after impasse." *Id.* at 692-93 (supporting Powell v. National Football League, 930 F.2d 1293 (8th Cir. 1989)). The divided *Powell* court held that impasse was still a "lawful stage of the collective bargaining process," *Powell*, 930 F.2d at 1302, and, therefore, antitrust protection remained. *See also* Brown v. Pro Football, Inc., 50 F.3d 1041, 1056-57 (D.C. Cir. 1995), *cert. granted*, no. 95-388, 1995 WL 555467 (U.S. Dist. Col., Dec. 8, 1995) (nonstatutory labor exemption shielded NFL from antitrust liability in imposing pre-impasse proposal on developmental squad players after an impasse was reached). The *Brown* court observed that the players retained the option of decertifying their unions, the option chosen by the NFLPA after *Powell*, if they wished to invoke the protections of the Sherman Act. *Brown*, 50 F.3d at 1057. This same option sharply divided the NBA players during their 1995 collective bargaining negotiations with the league before a new agreement was ultimately accepted.

75. According to one owner, the new baseball rule was known informally as the "Scott Boras" Rule because of his representation of the top pick in each of the previous three drafts

bring a complaint against MLB, the second challenge was in the form of a grievance filed by the MLBPA. Attempting to gain standing even though it did not represent amateur draftees, the MLBPA crafted a clever argument that the use of draft choices as compensation for the signing of veteran free agents thereby affected the MLBPA's members.[76] Because free agency was part of Major League Baseball's collective bargaining agreement, the union argued that the union had standing to object to any owner action affecting free agency. The MLBPA then argued that the owners' draft modification affected free agency because it increased the value of a first-round draft choice (because owners would be more likely to sign such draft picks, possibly at lower salaries) and, therefore, negatively affected the free agent market because a team would not be as willing to sign a free agent to a lucrative contract if it had to forfeit a more valuable draft choice than under the previous system. An arbitration panel agreed.[77]

V. DRAFT PROPOSALS

A brief summary of the mechanics of the four major drafts would be helpful at this stage. Major League Baseball conducts a 60-round draft in which graduating high school players, college juniors or seniors, and those who have completed two years of junior college are eligible.[78] Teams retain rights to draftees for one year or until a player returns to college, whichever is shorter.[79]

The NBA draft is open to any player whose high school class has graduated.[80] The draft is only two (soon to be one) rounds.[81] Exclusive rights to drafted players are retained for one year.[82] Any player with remaining college eligibility who enters the draft may return to college (and continue to play college basketball) within 30 days of the draft, and the drafting team would then retain his rights for an additional year beyond the expiration of college eligibility.[83] The one-year period of exclu-

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and his negotiation of over $1 million for each. *See* Bob Nightengale, *Padres Update*, L.A. TIMES, Sept. 22, 1991, at C-13B.

76. Spander, *supra* note 36, at 132-33.

77. *Id.* at 132-33.

78. *Id.* at 115.

79. *Id.* at 116; BASEBALL RULES, § 4(e).

80. NBA AGREEMENT, Art. IV, § 1(h).

81. NBA AGREEMENT, Art. IV, § 1(a); Chass, *supra* note 3.

82. NBA AGREEMENT, Art. IV, § 1(c).

83. Layden, *supra* note 4, at 14.

sivity is also tolled during any period in which the draftee plays in another professional league.[84]

The NFL has a draft of seven rounds and is available to those players whose classes have completed at least three years of college, absent a "hardship" petition. Those who still have remaining college eligibility must renounce that eligibility before they may be drafted.[85] Drafting teams retain exclusive rights for one year, a period that is extended to three years with respect to draftees who play in another professional league.[86]

Finally, the NHL draft is open to all players 18 years of age and older.[87] Teams retain exclusive rights to draftees for one year, except that such an exclusive period (i) shall be two years if a draftee plays junior hockey thereafter and (ii) is tolled with respect to those players who attend college or play on an Olympic or National team.[88]

Major League Baseball is the only sport that prohibits the trading of either draft choices or the assignment of the exclusive right to negotiate with draftees.[89]

The court in *Smith* suggested ways for the NFL to modify its draft, but curiously, did not consider the validity of any of its own proposals. The court first proposed a scheme whereby multiple teams could draft each player and each team would have a limited number of players it could sign.[90] The problem with such a proposal is that quality varies significantly among players. Limiting each team to signing ten players is not a viable solution if one team can sign ten of the best players and other teams are left with ten of the poorer ones. However, if players could be ranked without a draft system (which would be difficult, because the draft itself determines the ranking — a player only has high value if a particular team needs his skills after factoring in intangibles such as attitude, health, size and speed), a free negotiation system could be developed whereby each team may sign only a few players in each

84. NBA AGREEMENT, Art. IV, § 1(c).

85. NFL AGREEMENT, Art. XVI, § 2; Layden, *supra* note 4.

86. NFL AGREEMENT, Art. XVI, §§ 4(b), 5.

87. Collective Bargaining Agreement between the NHL and the National Hockey League Players' Association (NHLPA), § 16(B)(2) (June 1, 1988) [hereinafter NHL AGREEMENT]. The author was unable to locate the most recent NHL agreement, but believes that the terms of the previous agreement are still applicable.

88. NHL AGREEMENT, § 16(B)(5).

89. *See* BASEBALL RULES, § 4(c); NFL AGREEMENT, Art. XVI, § 7; NBA AGREEMENT, Art. IV, § 2; NHL AGREEMENT, § 16(B)(7).

90. Smith v. Pro Football Inc., 563 F.2d 1173, 1188 (D.C. Dir. 1978).

ranking group (and the worse a team is, the more higher ranked players it could sign).

A possible alternative could be to assign points to a player based upon where he is drafted (i.e. - 1000 points to a top draft choice and 10 points to a 7th round pick). Teams would draft through the normal means; however, teams would not have exclusivity but rather would be entitled to negotiate with all picks. Teams would then only be permitted to sign players up to an allocated total amount of points. For example, the worst team could sign 5000 points worth of players while the best team could get only 2000 points. This would achieve the desired result of distributing talent and would permit players to be ranked (and would establish their relative value) while allowing free negotiation.[91]

The second proposal offered by the *Smith* court is that a college player could negotiate freely with any team if he does not receive an acceptable offer.[92] This seems quite impractical. First, how is an acceptable offer to be determined? Because there are so many factors in addition to salary, such as length of contract and payment guarantees, it would be impossible to determine objectively an acceptable offer. Quite often, it may be the player's demands which are unreasonable (after all, a team is not going to waste a high draft pick on a player whom it does not value highly and is not willing to pay well). While independent arbitration works in baseball, it does so because the arbitrator must only choose between a team's one-year offer and a player's one-year offer. The arbitrator does not, and probably cannot, determine unilaterally the "fairness" of a particular complex offer. Such a system would be further impractical with respect to new players because, unlike baseball players in arbitration disputes, the drafted player has no professional statistics from which his value can be determined by a neutral party. If an independent arbitrator cannot possibly decide the fairness of an offer, the determination certainly cannot be left to the parties involved, thus leaving this idea of the *Smith* court completely unworkable.

A third proposal was to hold a second draft for players who did not come to terms with their original clubs.[93] This may have some merit but many problems as well. Were there many players who did not sign, a secondary draft could be held whereby each team would receive a pick

91. This will be discussed at greater length in the Part Six, *infra.*

92. *Smith*, 593 F.2d at 1188.

93. *Smith*, 593 F.2d at 1188.

in the respective round of its unsigned player.[94] If there were a sufficient number of players in each round, teams could pick from the players in that round that other teams could not sign. But unless there were enough such unsigned players, the problem would exist whereby a team has the undesirable choice between selecting a player at a position that it does not need to fill or a player of significantly lower ability.[95]

The fourth proposal was for a draft of fewer rounds.[96] This is what both the NBA and NFL did, and it seems to be a reasonable step. However, legally speaking, from the individual player's perspective, there is no difference between the first round draft choice who can only negotiate with one team and the eighth round draft choice who can only do likewise. If the draft is invalid as a restraint of trade for the reasons the *Smith* court gave, a shorter draft restraining the trade of fewer players should be equally illegal. But, if one is looking for a more practical solution, this is a good one. A high draft choice may have special status and leverage that often goes with his draft position, while the same is generally not true for a lower pick. Furthermore, players drafted in the lower rounds have little more chance of making a team than players who are undrafted and try out as free agents. For those people, the draft is helpful because it gets them on a roster with a bona fide chance in training camp to make a team, but hurts them because if they are subsequently released (as most are), it is often too late to try out for another team. Were these marginal players free agents from the start, they might have been better able to determine where they would have had the greatest opportunity of making a team.[97]

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94. It would be unfair, of course, to open this secondary draft to teams that had already signed their pick in the relevant round.

95. Suppose, hypothetically, that four teams fail to sign their first round picks (these being the first overall pick, a quarterback, the tenth pick, a linebacker, the eleventh pick, an offensive lineman, and the twenty-eighth pick, a running back). Allowing each of these four teams to re-draft these players would result in the worst team getting a player no better than tenth best and a linebacker instead of the needed quarterback.

96. *Smith*, 593 F.2d at 1188.

97. An argument against a shorter draft is that these marginal players seem to prefer to be drafted rather than be undrafted free agents. *See* Layden, *supra* note 4, at 106 (quoting the brother of Baylor star Brandell Jackson as saying, "[w]hen he didn't get picked, it was one of the worst moments of my life"); Donnie Webb, *Job Candidate Gets Nice Plug for His Resume*, ORANGE INSIDER, June 1, 1995, at 20 (stating that former Syracuse linebacker Dan Conley was disappointed not to be drafted); Mike Zizzo, *Defense Earns Mee Playing Time: Darnell Mee's Improved Offense Also Helps Earn Him a Starting Spot with the Hooters and Has Him Looking Forward to Next Week's NBA Draft*, ORLANDO SENTINEL, June 24, 1993 (quoting Mee, a United States Basketball League player and potential second round NBA draft choice, as saying, "I feel better about the draft, but confident would be a strong word. Anything can happen draft day, so I'm not getting my hopes up too much.").

A shorter draft makes the most sense especially in the NBA, where rosters are quite small. To some extent, it is also well suited for the NFL because there are relatively few roster spots available each year. But in baseball and hockey, with their extensive minor league systems and a large number of years before most prospects reach the major leagues (as well as the small percentage of high draft picks who actually develop as expected and reach the majors),[98] more rounds are needed. Tryouts for free agents do not make as much sense when these players would not yet be playing for the major league team anyway. Furthermore, in baseball, there are only nominal signing bonuses for all but the very top players and minor league salaries are equal among players at each level so the draft clearly serves to divide the talent rather than assign players to one specific team for the purpose of salary negotiations.

The final proposal of the *Smith* court was to eliminate the draft and employ revenue sharing to equalize teams' resources.[99] But even revenue sharing alone is not sufficient. Certain cities are more attractive to players (because of media publicity, weather, living conditions, etc.) and, as the *Smith* court itself argued, one ought not forget the impact of coaches. If coaches have as great an effect on a team's success as the D.C. Circuit apparently believed, then a player draft is even more necessary to balance the effect of coaching and maintain parity in the league.

The recent baseball change received much publicity in the media; the majority of writers opposed baseball's modification but generally acknowledged that a system in which Todd Van Poppel, a certain top choice, went to the World Champion Oakland A's rather than to a bad team and in which the Houston Astros, the worst team in the majors that year, failed even to sign its top draft choice, was flawed.[100]

The baseball situation poses an interesting dilemma. On one hand, since the purpose of the draft is to assign more talented players to the worst teams, if those teams lose their top players to colleges or if they do not draft the best available players because it is "safer" to select players they are more likely to sign (the wealthier, more competitive teams are better positioned to gamble on the Van Poppels), the objective of achieving competitive balance will not be attained.[101]

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98. Only one minor leaguer in ten ever plays major league baseball and only one in fifty remains in the majors for at least six years. Zimbalist, *supra* note 47, at 106.

99. *Smith*, 593 F.2d at 1188.

100. *See* Billy Sample, *Amateur Draft Rule Flirts With Disaster*, USA TODAY BASEBALL WEEKLY, Apr. 1-7, 1992, at 15.

101. In recent years, the "signability" of players has become an important factor to be considered by teams in using their top selections. See Mark Maske, *Notebook*, WASH. POST,

It seems that baseball should design some other system in which clubs that fail to sign a player receive an extra pick the following year the same round in which the unsigned player was selected. This extra pick should be in the same position within the round as the lost pick, rather than at the end of the round. That way a competitive balance can still be achieved without severely restricting the freedom of high school players. This proposed system of compensation for failure to sign a player would also have the desired effect of not forcing clubs to overpay for the Brien Taylors and Todd Van Poppels. This is because if a team does not suffer so greatly from failing to sign its first pick, it would face less pressure to overpay that player. Players would not be able to use the college threat to exact greater compensation. The loss suffered by deferring the realization of the draft choice for one additional year, however, is probably enough incentive for teams to present reasonable offers to their draftees.

Another proposal could require high school players to declare themselves "in" the draft, as the NBA and NFL now require of college undergraduates. Only such players could then be drafted. This would prevent the Todd Van Poppel situation. However, the problem with such a system is that unless there were an agreement with the NCAA whereby an "in" declaration would make a player ineligible for college ball, all players would declare themselves "in" and then decide what to do. On the other hand, a binding "in" declaration would tilt the balance significantly in the favor of owners, as the players who opt in would have little choice but to sign.

Any attempt to eliminate the eligibility of any high school baseball player who had declared himself "in" the draft would likely face legal challenges, such as those faced by the NCAA on a few occasions from football players. The most notable of these challenges is *Banks v. National Collegiate Athletic Association (Banks II)*.[102] Banks, a student at Notre Dame, renounced his final year of eligibility to enter the NFL draft, was not drafted, and unsuccessfully sued to be able to resume play-

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June 7, 1992, at D5 (discussing "signability" as being a key issue in the first round of the 1992 amateur draft and how two players (Charles Johnson and John Burke) represented by agent Scott Boras, known as a hardline negotiator whose players often fail to sign contracts, were drafted far below their projected positions; Maske quotes an unnamed baseball executive as saying, "[o]f course Boras was a factor with the Miami kid [Johnson]. Nobody wanted to deal with Boras."). *See also* Zimbalist, *supra* note 47, at 100 ("some people are concluding that these high prices are undermining the poor team's ability to rely on the amateur draft and their farm systems to develop competitive teams. Poor teams will no longer be able to afford first-round picks.").

102. 977 F.2d 1081 (7th Cir. 1992).

ing at Notre Dame.[103] The NCAA, as defendant, argued to the district court that "a clear line of demarcation between amateur and professional athletic pursuits" was necessary for "the integrity and quality of college football."[104] Assuming this represents the policy of only the NCAA, the court's agreement seems reasonable. However, were this position actually the result of an explicit agreement between the NFL and the NCAA, the antitrust analysis of the joint action might have compelled a much different result. Even the district court in *Banks* noted that were it to decide differently, NFL owners would be displeased because of the havoc it could wreak on the draft and because it could tilt the relative bargaining power significantly toward the players.[105]

The NFL prefers to require college students to renounce their eligibility because, in doing so, players foreclose the primary competitor for their football talents and thus minimize their leverage. Were juniors to be drafted and then be allowed to return to college, the system of rewarding the worst teams could be thwarted and salaries would necessarily escalate for those players who have the added leverage provided by that option (as in baseball, where worse teams must consider not only the best available athletes, but their likelihood of signing those players). An acceptable solution might be for younger players to be permitted to apply for the draft without renouncing eligibility and for the drafting teams to retain their rights to those players until graduation. That way, the Braxton Banks of the world would not be shut out altogether, while players would not be able to use the NCAA as a pawn against NFL teams.

VI. PROPOSAL AND CONCLUSION

No single draft proposal could work perfectly for each of the four major sports because each is somewhat unique. For starters, for the rea-

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103. *See also* Gaines v. National Collegiate Athletic Ass'n, 746 F. Supp. 738 (M.D. Tenn. 1990) (agreeing with district court in *Banks* in denying relief to a former Vanderbilt University football player).

104. Banks v. National Collegiate Athletic Ass'n, 746 F. Supp. 850, 861 (N.D. Ind. 1990) ("Banks I"). *Banks I* concerned Banks' unsuccessful attempt to obtain a preliminary injunction. Thereafter, Banks filed an amended complaint seeking a permanent injunction, which the district court dismissed and the Seventh Circuit affirmed in *Banks II*.

105. *Banks I*, 746 F. Supp. at 861, n.13. There seems to be little doubt that the NFL prefers such a policy. *See* Layden, *supra* note 4 (quoting New York Giants Director of Player Personnel Tom Boisture as responding to an inquiry as to whether the current policy will be changed by saying, "Are you kidding"). Colleges also seem to prefer the current system. When asked if the system should be changed, Baylor coach Chuck Reedy responded, "[t]hat would mess up everything." *Id.*

sons already discussed herein, I believe the *Smith* case is a poorly reasoned decision.[106] Although economists disagree with each other, there appears to be substantial evidence that professional drafts are meant to be, and succeed in being, a major factor behind the competitive balance in sports. The earlier dominance of the Montreal Canadians, by virtue of their draft preference in hockey, and the New York Yankees and Brooklyn Dodgers, when baseball lacked a draft, among other things, provides strong evidence in favor of a competitive draft. The fact that draft choices are often major parts of trades and are forfeited as compensation for signing free agents provides further evidence that the stated intent of the owners for the draft to preserve competitive balance is not mere lip service.

However, the *Smith* decision is helpful to the extent that it prohibits unilateral owner action and, therefore, encourages negotiation between the owners and the players (other than in baseball, of course).[107] The recent baseball modification, struck down by an arbitration panel thanks only to its questionable endorsement of the union's crafty argument, provides an example of the potential dangers which exist when both (i) owners are not required to conduct their draft in accordance with collective bargaining agreements with the players and (ii) the antitrust rule of reason inquiry is inapplicable.

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106. *Smith*, incidentally, was criticized by the Second Circuit in *United States Football League v. National Football League ("USFL")*, in which the Second Circuit rejected *Smith* as inconsistent with *Wood*. *USFL*, 842 F.2d 1335, 1372 (2d Cir. 1988). Unfortunately, while I agree that the reasoning of *Smith* should be rejected, I believe that the Second Circuit was wrong in its conclusion that *Smith* and *Wood* are inconsistent. As discussed earlier, *Wood* upheld the NBA draft as being subject to the non-statutory labor exemption as a product of collective bargaining while in *Smith*, the labor exemption was inapplicable because Yazoo Smith was drafted before the NFLPA became the exclusive bargaining agent for purposes of the exemption. *Compare Wood*, 809 F.2d at 961-62 *with Smith*, 593 F.2d at 1177 n.11, and Smith v. Pro Football, Inc., 420 F. Supp. 738, 742 (D.D.C. 1976). *Wood* is not inconsistent with the D.C. Circuit's opinion cited by *USFL*, but is only inconsistent with dicta in the District Court's opinion in *Smith* that states that even if there were a collective bargaining relationship, the amateur draft was not a mandatory subject of bargaining so as to fall within the labor exemption. *Smith*, 420 F. Supp. at 742-744. The Second Circuit, however, only cited the D.C. Circuit opinion in *Smith* as being inconsistent with *Wood*; since the D.C. Circuit never rendered an opinion as to the District Court's dicta, the Second Circuit therefore was in error in claiming inconsistency. In fact, quite the opposite of what the *USFL* court believed, the *Wood* court agreed generally with *Smith* in assuming that "in the absence of a collective bargaining relationship with a union representing the players, [the draft] would be illegal." *Wood*, 809 F.2d at 959.

107. Although, as I argued earlier, all leagues should be permitted to implement their own draft rules, so long as the sum of all pro-competitive effects outweigh the totality of anti-competitive effects under a rule of reason analysis. The *Smith* decision, unfortunately, prevents the leagues from unilaterally implementing virtually any restraint.

My first (and minor) proposal for a draft is that it should be of limited duration. For basketball and football, the draft should be for as many rounds as roster spots are generally available each year to rookies. If only six rookies make an average NFL club each year, there is no reason to have a longer draft (although shorter might still be appropriate). However, the length of the draft would not really matter were my second proposal to be adopted.

My major proposal, as mentioned briefly earlier, is to hold a normal draft that does not convey negotiating rights. Instead, the draft should be used to assign relative point values to each player. Each team would be given a total number of points that it would be permitted to sign and that value would vary according to team performance the previous year (as mentioned earlier, for example, the worst team might be allocated 5000 points while the best might be given 2000 points). Thus, the worst teams would have enough points to permit them to sign a few star players, while the best teams would be able to sign one, at the most.[108] Teams could negotiate freely with all players but could only sign players up to a given value. Such a system would be better suited to benefit the worst teams than the current system which only gives one extra pick to the the worst teams than to the best teams. Rather than trade veteran players for draft picks, as under the current system (in all sports except baseball), teams could trade these players for points.

Baseball and hockey could use similar point systems to ensure that one team does not hoard talent, while allowing players some choice as to where they go. Furthermore, were baseball to have such a system, its failed effort to implement the recent change would be irrelevant because no team would suffer the loss of an individual player choosing to enter college. The worst teams would still have the chance to sign the greatest amount of talent and would not have to fear drafting an unsignable player. Similarly, the NFL and the NBA would not have to fear underclassmen declaring their eligibility and then attempting to go back to

108. There are a few ways to ensure that players were appropriately ranked. First, teams should have an independent incentive to draft the best players early in the draft because of the fear that if a star player were assigned a low point value, the best teams could sign him without losing many points and, thus, defeat the goal of achieving a competitive balance. A way to ensure that players are drafted (and thus ranked) in the true order in which they would normally be selected would be to grant a percentage point discount whenever a team signs a player it has drafted. For example, if a player who has been assigned a value of 1000 points according to the position in which he was drafted signs with the team that drafted him, perhaps only 900 points would be deducted from that team's point limit. By having such a discount, teams would draft the players they want so as to obtain this discount that would otherwise be available to an opponent.

college; allowing these students to be drafted while freely retaining the option to return to college would thus resolve a problem that has plagued underclassmen for years.

This system appears to have many of the benefits of distributing talent without having the primary drawback of restricting the players market. Players could negotiate freely and sign with any team, but teams would be limited in the amount of talent they could sign. Additionally, unlike proposals such as those in which multiple teams could draft an individual player or in which teams would be limited in the total *number* of players signed, this proposal would limit the total *value* of the players drafted and signed.

In summary, this proposal should benefit teams by (i) eliminating the chance that they would risk forfeiting top draft choices if unable to sign them, (ii) reducing the leverage top draft choices have over teams by making available substitute high draft choices with whom teams could negotiate, and (iii) providing a greater selection of players with whom to negotiate. It would benefit players by (i) giving them free choice and (ii) allowing them to be drafted while retaining the option to return to college without a loss to any party.